IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 643

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A NEBRASKA CORPORATION,
Petitioner,

vs.

ANTONIA P. MICCOLIS,
Respondent.

PETITIONER'S REPLY BRIEF ON ITS PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

Respondent resists the petition upon three grounds:

A. That petitioner is attempting to present its Point A (petition and brief p. 7) for the first time in this Court;

B. That under the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, this Court is not here concerned with conflicts among the various Circuit Courts of Appeal;

C. That the instruction complained of by petitioner (Brief Point C, p. 17) was more favorable than petitioner had a right to ask.

Petitioner wishes briefly to reply to these contentions.

A.

In view of the record, it is not understood why respondent says that petitioner's point on incontestability was not made in the Court of Appeals. (p. 5) The District Court held the statute inapplicable (R. 195: where plaintiff's request for instructions was refused). Therefore, the question was not presented to the Circuit Court of Appeals in petitioner's original brief. Petitioner had won that point in the district court. The point was made on appeal for the first time in respondent's answer brief. Thereupon petitioner replied and attempted to meet the contentions of respondent. It presented the question again on rehearing. While the language in the reply brief and that of the petition for rehearing was not in all respects the same, the fact remains and cannot be disputed that the point here presented is the identical point presented to the Circuit Court of Appeals (R. 256). This point may be stated simply and briefly: this policy was not rendered incontestable by the incontestability clause of the life insurance statute of Indiana. Respondent took the contrary view and in support of it argued that because the claim was for death benefits, the policy became a life policy. The ultimate question here is not of the title, style or denomination given the policy, but whether it is an incontestable contract, made so by statute.

The Circuit Court of Appeals could not escape an answer to this question either when it considered the reply brief (pp. 4, 8-15), or passed on the petition for rehearing.

On petition for rehearing the point was further elaborated on, and an additional authority cited, which, far from being intentionally withheld from the Court as charged in respondent's brief (p. 4), was called forth for the first time because the Circuit Court of Appeals held that this was a life policy. This additional authority (*Western Life Indemnity Co.* v. *Bartlett*, 84 Ind. App. 589) holds that even

life policies are divided into two groups, the ordinary level premium, and the assessment type, to the latter of which the incontestability clause of the statute has no application.

Certainly it must be said that both by the reply brief and the petition for rehearing the Circuit Court of Appeals had this question before it from every standpoint. It had the case for all purposes until it passed on the petition for rehearing (R. 259).

No authority has been cited by respondent, and none has been found by petitioner, holding that a petitioner for writ of certiorari may not rely upon an authority cited to the Circuit Court of Appeals for the first time in a reply brief or on petition for rehearing. Probably no counsel appearing for a respondent in this Court has ever thought to offer such an unsubstantial objection to the allowance of a writ. Even in the present case respondent makes the point in extremely general terms, without elaboration or citation of authority.

It is believed that the learned counsel for respondent has failed to distinguish between a point made and reasons given in support of it. The discussion of the question has not always been in the same language, but the question itself has not varied.

The principle, if there be one, invoked by respondent, is contrary to that applied by this Court in the *Agee* case (268 U. S. 687), wherein Your Honors granted certiorari but revoked it (269 U. S. 551) because of the intervening decision of *Carter* v. *Standard Accident & Insurance Company* by the Supreme Court of Utah. This Court recognized an additional authority after certiorari had been granted.

Respondent's position is equivalent to a denial of the right of a party to offer additional authorities at any stage of the proceedings, a contention which is highly technical and not, so far as we know, encouraged by courts of review.

Points B and C.

Points B and C of respondent's brief seem to call for no further discussion than that already embodied in the brief supporting the petition.

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